Compensability of Injuries to Remote Workers

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Telecommuting Facts:

- 1/3 of the workplace worked from home because of COVID-19 as of May 2020 according to the U.S. Bureau of Labor Statistics.
- Approximately ¾ of office-based business and professional employees had been working from home early in the pandemic according to data collected from NCCI.
- The U.S. Bureau of Labor Statistics states that more than 60% of job require a significant on-site presence.
- NCCI discusses on its website possible greater prevalence of claims for telecommuters because of lack of workplace safety optimization and ergonomics.
- Balance that against decreased work-related motor vehicle accidents, which tend to be costlier than other types of injuries.

Dearth of Controlling Case Law

- Consider related tops:
  - Personal Comfort Doctrine
  - Going and Coming Rule
  - Mutual Benefit Doctrine

Arising out of/In the Course of Employment

- Employers are liable for personal injuries by accident arising out of and in the course of the employee's employment. K.S.A. 44-501b(b)
- Arising out of and in the course of are like salt and pepper. They are always next to one another, but they are different things and a prima facie (well-seasoned) claim should have both.
- "The two phrases arising 'out of' and 'in the course of' employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq.,* have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable." *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, Syl. ¶ 3 (1995)

Arising out of:

- "…requires some causal connection between the accidental injury and the employment. An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of employment." *Id.* at ¶ 4

In the course of:

- "The phrase 'in the course of' employment relates to the time, place, and circumstances under which the workers' accident occurred and means the injury happened while the employer was at work in the employer's service." *Id*. at ¶ 5.

Arising out of/In the Course of

Arising out of:

- Is the employer doing things the employer is supposed to be doing?

In the Course of:

- Are those things being done at an appropriate time, and place?

One Condition without the Other:

- Horseplay at work: In the course of, but not arising out of.
- Intoxication: In the course of, not arising out of.
- Work-sponsored recreational activities: Arising out of, not in the course of
- Assaulting a co-worker: In the course of, not arising out of
- Codified defenses under K.S.A. 44-501

Telecommuting and these Two Tests:

- Perhaps not as difficult as it seems at first.
- Understanding between the parties as to what work tasks are supposed to be performed and under what circumstances—helps clear up what “arises out of” the employment when working from home.
- Telecommuting employees are given special trust by the employer. Inherently, they are not being supervised and are given license to complete work tasks away from the structure of the traditional work environment.

Possibilities for Employers to Limit Liability?

- SHRM has a sample Telecommuting Policy online as a template.
- SHRM also discusses possibility of established guidelines for a home office, such as a designated work area and training related to work station setup and safety measures, including ergonomics.
- Set work hours and break periods to better draw a distinction between when an employee is in the course of employment and when the employee is not.
- https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/wcandtelecommuting.aspx
- NCCI also recommends specific agreement regarding the scope of which work is to be performed at home and during which hours to separate work from non work-related injuries.

OSHA's Guidance

- Response to letter regarding Standard Number 1904.4(b)(7); 1904.30(b)(3); 1904.46(3)
- "Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting.

OSHA's Examples:

- Employee drops a box of work document and injures his or her foot—work-related.
- Employee's fingernail is punctured by a needle from a sewing machine used to perform garment work at home and becomes infected—work related.
- Employee is injured because he or she trips on the family dog while rushing to answer a work phone call—not work-related
- Employee is electrocuted because of faulty home wiring—not work-related.
- https://www.osha.gov/laws-regs/standardinterpretations/2009-03-30

Personal Comfort Doctrine

- “Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.” 1 Larson’s Worker’s Compensation Law § 21 [2006]. Quoted with approval in *Williams v. Allied Staffing*, Dkt. No. 1,058,426, 2012 WL 1142973 at *3 and *Gould v. Wright Tree Service, Inc.*, No. 114,482, 2016 WL 2811983 (Kan.App. 2016)(unpublished).

Personal Comfort Doctrine

- *Gould* discussed the doctrine in the context of a smoke break, bathroom breaks, and a coffee break, but noted that when accidental injuries occur on an authorized break, there is no deviation from employment.
- The “be right back” test?
- The general rule is that ministering to an employee’s personal comfort is typically considered an incident of employment and activities which are incidental to employment are considered to “arise out of employment.”

Recent Personal Comfort Doctrine Cases:

- In *Thach v. Farmland Foods, Inc.*, 2020 WL 1140324 (Kan.Work.Comp.App.Bd. Feb 28, 2020), the Board found claimant's activity of moving his motorcycle to a different parking spot while on break fell within the doctrine and benefitted the employer that the employee was following the rules and policies. Benefits permitted.
- In *Mayes v. Covenant Care Senior Living*, 2020 WL 5350585 (Kan.Work.Comp.App.Bd. Aug 4, 2020), the Board found claimant's injuries compensable while he was on a paid break as employer allowed employee to take naps, which rendered them work-related conditions.

Personal Comfort Doctrine Cases:

- *Sneath v. Advantage PRN, LLC* 2019 WL 528165 (Kan.Work.CompApp.Bd.), the Board found injuries from MVA compensable. Involved a traveling nurse permitted to take a 30-minute lunch break and was not permitted to eat in the facility's cafeteria. Result due to the fact claimant was required to make her own accommodations for lunch break.
- *Ross v. A&C Enterprises, Inc.*, 2017 WL 491310 (Kan.Work.Comp.App.Bd.), compensable case where claimant left her work space to put away a personal package received at work. Claimant testified she was allowed to take breaks as she wished, was allowed to leave the premises, and had never been instructed otherwise by her employer.

Personal Comfort Doctrine Cases:

- *Laughlin v. Goodyear Tire & Rubber Co.*, 2016 WL 765590 (Kan.Work.Comp.App.Bd.), claimant tripped while on his way to get fresh air. Testimony that was for 20 years, he and other employees would walk to the south dock to get fresh air, as the building can get hot. Board found that ameliorative steps to prevent himself from becoming overheated brought him within the doctrine. Respondent argued claimant could have gone to air conditioned break area instead of area outside the dock, but employee prevailed.

Personal Comfort Doctrine Cases:

- *Edmonds v. Weller's Bar & Grill*, 2018 WL 1720638 (Kan.Work.Comp.App.Bd.), Board overruled judge that an injury that occurred on a smoke break was compensable. Claimant was in the alleyway of the restaurant when he saw a car driving erratically from the back alley to the front of the building. Claimant yelled at the driver to slow down and the driver did a sick burnout and nearly struck the employee. Employee, concerned about his safety and that of the patrons, went inside and requested someone call the police. He then went back outside to finish smoking when the driver stepped out of the car and stabbed claimant in the right eye and punched him.

Going and Coming Rule

- K.S.A. 44-508(f)(3)(B):
- “The words ‘arising out of and in the course of employment’ as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which is not the employer’s negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work that is a route involving a special risk or hazard connected with the nature of the employment, that is not a risk or hazard to which the general public is exposed and that is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment if the employee is a provider of emergency services responding to an emergency.”

Going and Coming Rule

- Typically, the doctrine is invoked to avoid liability for injuries sustained while employees are commuting to and from work.
- Not exposed to any greater risk by virtue of the employment.
- Have not assumed the duties of employment yet.
- Consider parking lot cases—if not owned by the employer or under employer's exclusive control, look for constructive possession of the lot. *Rinke v. Bank of America*, 282 Kan. 746 (2006).

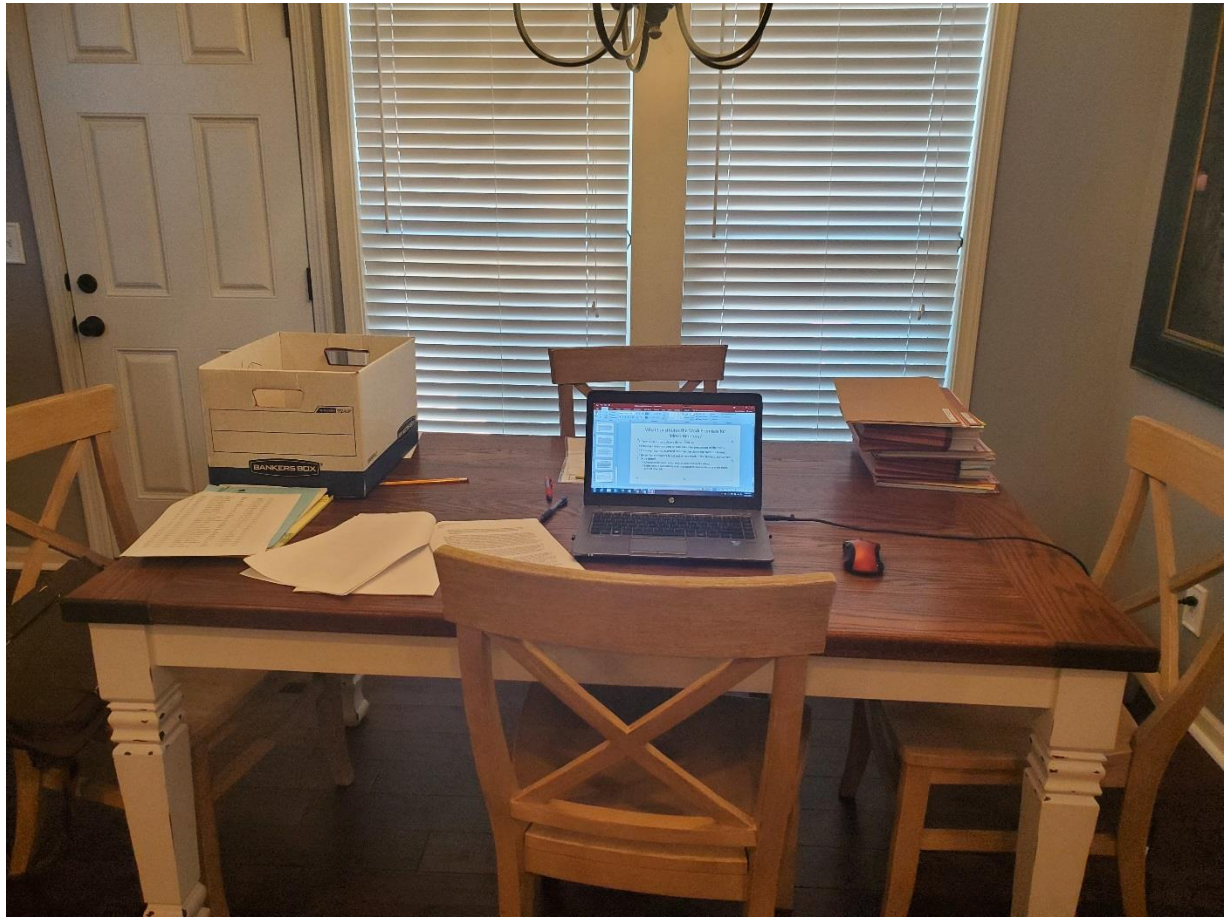
Going and Coming Rule

- Exception for when travel is an intrinsic part of the job or is required to complete some special work-related errand or special-purpose trip. See, *e.g., Halford v. Nowak Const. Co.*, 39 Kan.App.2d 935 (2008); *Craig v. Val Energy, Inc.*, 47 Kan.App.2d 164 (2012)
- In *Craig*, the Court of Appeals stated, "the analysis is really whether travel has become a required part of the job such that the employee actually assumes the duties of employment from the moment he or she leaves the house and continues to fulfill the duties of employment until he or she arrives home at the end of the workday." See *Long v. Houser*, 57 Kan.App.2d 675, 681 quoting *Craig*, 47 Kan.App.2d at 168.
- But, what about the situation where the worker never leaves his or her house? At what point is the employment assumed? Where is the distinction between at work and not at work when one's home is the workplace?

What Constitutes the Work Premises for Telecommuters?

- Traditional notions simply do not hold up.
- Employer does not own or take exclusive possession of the home.
- Employer has not asserted constructive dominion over the home.
- Better for employers to set out where work in the home is authorized to be done?
  - Eliminates confusion about what is and is not work-related.
  - Might help to limit liability such that accidents in remote parts of the home are not covered.

My Work away from Work 3/20-8/21



Weltz Household Work Hazard?

Slipping in and out of Employment

- “Dad, when do you get to take a break from work?”
- “Michael, I can take a break whenever I want.”
- “Cool. Will you make me a sandwich?”

Actual conversation between my son and I on 8/11/21.

My recommendation is a time clock to better keep track of when telecommuters are “at work” and when they are on their own time. For hourly employees, this is obviously critical. For salaried employees, it’s going to be more difficult.

Going and Coming

- Abandonment of Employment
- Cannot leave a place where you reasonably should be, even if on an overnight work trip to engage in activity entirely separate from legitimate work purpose, and still have an injury while on that deviation be considered compensable.
- *Atkins v. Webcon*, 30 Kan. 92 (2018).
- In *Atkins*, claimant left the employer-provided hotel to cross the street to a different hotel to partake at its bar and was struck and killed as a pedestrian while returning to the provided hotel.
- I thought about that case whenever I would cross the street to get my mail when working at home. But, as that was my personal mail, I'm sure that I would not have had a compensable claim had I been hit by a car.

Going and Coming Cases:

- *Jones v. Value Place Property Management, LLC*, 2017 WL 1330464 (Kan.Work.Comp.App.Bd.), claimant injured while taking work home. Going and coming rule did not apply. Claimant was permitted to work from home and to be prepared to work from home. She would take her laptop and binder home each night in case of inclement weather. As she left work, she was carrying these materials home and she missed a step and fell, resulting in various injuries. Employer leased the property. Deciding Board Member focused on the fact that carrying the work materials created a causal nexus to work and the benefit to the employer of claimant being able to work from home, as needed.

Going and Coming Cases:

- *Debacker v. Ardent Health Services*, 2020 WL 5350589 (Kan.Work.Comp.App.Bd.), claimant fell onto the sidewalk and fell into the premises exception of the going and coming rule. Case provides a good discussion of the contours of the doctrine. Here, the sidewalk was leased by the employer and found to be under the employer's control. Key test is whether the employer exerts contrl over the area where the accident occurred.
- *Adkins v. Centurion Industries*, 2020 WL 4530558 (Kan.Work.Comp.App.Bd.), claim was barred by going and coming rule. Claimant attended training at an out-of-town facility and stopped twice. One stop was to go t a hardware store and the second was to go to a golf clubhouse to watch sports on television. After leaving the clubhouse, he suffered a rollover MVA and sustained major injuries. Frolic and detour is the doctrine under which this falls.

Work Premises?

- Any place under the exclusive "control" of the employer where the usual business is being carried on or conducted. *Rinke v. Bank of America*, 282 Kan. 746 (2006).
- Premises are narrowly tailored. It took pretty extreme facts in *Rinke* to make the parking lot part of the work premises.
- But, where the employer has given the employee its blessing to conduct work from home, there's an argument to be made that the place where that work is authorized to be conducted is part of the premises of the employer.

Work Premises?

- “[I]f the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitation on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.”
- Above from *Kanode v. Sprint Corp.*, 2009 WL 978949 (Kan.Work.Comp.App.Bd. 2009) citing Larson’s Workers Compensation Law § 13.05(f) (2008).
- Work hazards must be something above an beyond those same risk and hazards faced as the general public. See *Atkins*, 308 Kan. 92, citing *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46 (1994).
- For telecommuters, must we engage in a hypothetical of whether the risk would have been encountered in the home irrespective of the home work environment? Is that the basis of the OSHA guidance on the subject?

Mutual Benefit Doctrine:

- In the context of a fixed worksite, travel that was mutually beneficial was considered work-related for purposes of avoiding the going and coming rule. *Weber v. Servpro*, 2018 WL 2091401 (Kan.WorkComp.App.Bd. (2018).
- Employment required the individual drive a company vehicle, which benefited both of them.
- Employer gets the benefit of traveling employee having reliable transportation and employee gets benefit of company car.

Mutual Benefit Doctrine--Telecommuting

- Particularly in light of COVID-19—huge benefits to employer and employee.
- Safer workplace?
- Less Distraction?
- Less exposure to workplace hazards?
- No commute
- But…less supervision, no witnesses to accidents, new risks that are more difficult to monitor/eliminate.
- It’s about a fair balancing and trust.